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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-556

EAST END YACHT CLUB, INC.,

Petitioner,

v.

BUCKLEY BROS.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

EAST END YACHT CLUB, INC.,

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v.

BUCKLEY BROS.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, East End Yacht Club, Inc., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on the 15th day of July, 1977.[1]

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[1] After filing the appeal, but prior to its argument, the actions of all plaintiffs, except East End Yacht Club, Inc., were dismissed by stipulation of the parties as having been settled for the sum of $150,000.00.

The action against defendant, Shell Oil Company, was dismissed by the District Court on September 2, 1974 on granting summary judgment in its favor on the grounds that the facts, as

(footnote continued on following page)

Opinions of the Courts Below

The opinion of the United States District Court for the District of Connecticut was filed on October 19, 1976 and amended by its order of December 21, 1976 so as to certify an interlocutory appeal in accordance with 28 U.S.C. § 1292(b). The opinion is reported at 421 F.Supp. 1275 and is set forth herein—Appendix A and A-1.

The United States Court of Appeals for the Second Circuit, by its order of January 28, 1977, granted leave to appeal, which order is set forth as Appendix B herein. The opinion of the Court of Appeals is part of its order and judgment entered July 15, 1977, is unreported, and set forth herein as Appendix C.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Second Circuit was entered July 15, 1977.

Questions Presented

1. Does a separate and individual basis for Federal jurisdiction, other than Admiralty, exist in an action arising from respondent's spilling approximately 655,000 gallons of oil into the harbor of Bridgeport, Connecticut, causing damage to petitioner's docks and other personal property situated on and abutting the interstate and navigable

(footnote continued from preceding page)

presented by the parties then and the applicable Maritime law, permitted no inference which might create a duty which was breached by Shell Oil.

The petition herein refers singularly to petitioner, East End Yacht Club, Inc., and the respondent, Buckley Bros., as the remaining parties in this action.

waters of that harbor such that a jury demand must be honored?

(a) Does § 13 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. § 407) imply a private right of action in favor of petitioner to recover its damages for respondent's violation thereof in its unauthorized depositing of approximately 655,000 gallons of oil into the harbor of Bridgeport, Connecticut, causing damage to petitioner's docks and other personal property situated on and abutting the interstate and navigable waters of that harbor?[2]

(b) Does the petitioner have a right of action under the Federal common law of water pollution as enunciated by this Court in *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390, for damage to its dock and other personal property situated on and abutting the harbor of Bridgeport, Connecticut as a result of respondent's spilling approximately 655,000 gallons of oil into the interstate and navigable waters of that harbor?

Statement of the Case

This action was initially instituted by all the parties named in the complaint to recover money damages arising from damage to their docks, shellfish beds, and other personal properties situated in and abutting the harbor of Bridgeport, Connecticut as a direct result of a spill of approximately 655,000 gallons of oil into the interstate and navigable waters of that harbor by respondents (See n.1, supra).

This occurred when a cargo of oil was being pumped off a cargo ship to a terminal being operated by the respondent, Buckley Bros., as a result of an improper alignment of a valve causing the discharge of oil into the harbor.

[2] The text of § 13 of the Rivers and Harbors Appropriations Act of 1899 (33 U.S.C. § 407) is set forth herein—Appendix D.

The jurisdiction of the District Court was based on maritime tort and Federal question arising under 33 U.S.C. § 407. Petitioner demanded trial by jury on the face of the complaint—Appendix E herein.

Respondent Buckley Bros. moved the District Court for an order striking the jury demand on the ground that the basis of action was solely within the Admiralty and Maritime jurisdiction under 28 U.S.C. § 1333(1), and that such jurisdiction does not provide a right of trial by jury.

Petitioner claimed that, in addition to the Admiralty jurisdiction, its claim fell within Federal question jurisdiction under 33 U.S.C. § 407 by implication, as well as under the Federal common law of water pollution, such that jurisdiction was invoked within the meaning of "laws" in 28 U.S.C. § 1331(a) so as to entitle petitioner to a jury.

The District Court, by its opinion and order dated October 19, 1976, granted the respondent's motion.

The Court below, by its order and judgment of July 15, 1977, affirmed the District Court's order on the basis of the District Court's opinion dated October 19, 1976.

Reasons for Granting the Writ

By adoption of the District Court's opinion, the Court below in holding ". . . that § 407 does not create a private cause of action under the laws of the United States . . ." is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Guthrie* v. *Alabama By-Products Company,* 328 F.Supp. 1140, 1145, aff'd 456 F.2d 1294 (1972), clearly holding that a private Federal right of action arises by implication from a violation of 33 U.S.C. § 407. Moreover, the decision of the Court below is contrary to the weight of authority respecting such right of action, upon which weight the Court in *Guthrie* v. *Alabama By-Products Company,* supra, relied.

Additionally, and again by adoption of the District Court's opinion, the Court below, in holding that no right of action arises to the petitioner under the Federal Common Law of Water Pollution, is in conflict with the decision of this Court in *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390 (1972), holding, without limitations or conditions, that pollution of interstate or navigable waters creates actions arising under the laws of the United States.

The ever-growing Federal concern with pollution of our national waterways calls for the broadest possible reading of this Court's enunciation of a Federal common law of water pollution in *Illinois* v. *City of Milwaukee, Wisconsin,* supra.

The confining and restrictive interpretation of *Illinois* v. *City of Milwaukee, Wisconsin,* supra, by the District Court is contrary to the Congressional policy of protection for the individual against the devastating, destructive effects of pollution of interstate or navigable waters; a policy of such grave Federal concern so as to result in a declaration of the existence of a Federal common law of water pollution by this Court as a means to effectuate that special Federal interest through the uniformity of rules of decision fashioned by the Federal Courts.

The Rivers and Harbors Appropriation Act (33 U.S.C. § 401, et seq.) was a measure taken by Congress in its effort to obviate the spoliation of our national waterways.

The Lower Courts, in giving recognition to the special Federal interest and national policy of protection for all individuals against pollution, are consistent in their holdings that this Act, including § 13 (33 U.S.C. § 407), gives rise to a Federal right of action by implication.

That these Courts misapprehended the full protective scope of § 13 so as to limit such private right of action to pollution effecting navigation, rather than as a flat ban

against unauthorized deposits of foreign matter regardless of its effect on navigation, does not dilute the private right of action. Indeed, such right is broadened so as to provide causes of action by implication within the full scope of 33 U.S.C. § 407, as finally settled by this Court in *United States* v. *Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 671-672, 93 S.Ct. 1804, 1814-1815 (1973).

The decision of the Court below is not only in conflict with the weight of judicial authority, but is in conflict with the Federal policy created for the protection of the individual right to be safe from injury from water pollution and to have appropriate Federal remedies for such injuries; from which arose their 33 U.S.C. § 407 right of action, and which rights and remedies have been further expanded by this Court in *Illinois* v. *City of Milwaukee, Wisconsin*, 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390 (1972), in its holding of a Federal common law of water pollution of interstate or navigable waters.

The importance of Federal questions concerning the rights and liabilities of all persons relating to pollution of our national waterways cries out for an exercise of this Court's supervision and settlement of these questions.

POINT I

Petitioner has an implied Federal right of action for damages arising from respondent's violation of 33 U.S.C. § 407.

The cases are uniform and consistent in their holdings that an implied right of action arises from a violation of § 13 of the Rivers and Harbors Appropriation Act of 1899 (13 U.S.C. § 407). *H. Christiansen & Sons* v. *City of Duluth*, 154 F.2d 205 (8th Cir. 1946); *Guthrie* v. *Alabama By-Products Company*, 328 F.Supp. 1140 (1971), aff'd 456 F.2d 1294 (5th Cir. 1972); *Morania Barge No. 140, Inc.* v. *M. & J. Tracy, Inc.*, 312 F.2d 78 (2d Cir. 1962); *Hawkinson*

v. *Blandin Paper Company*, 54 F.R.D. 517 (D.Minn. 1972); *Lavagnino* v. *Porto-Mix Concrete, Inc.*, 330 F.Supp. 323 (D.Colo. 1971); *Kalur* v. *Resor*, 335 F.Supp. 1 (D.D.C. 1971); *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*, 259 F.Supp. 633 (E.D.Va. 1966).

Although the Courts disagree as to the scope of 33 U.S.C. § 407, some construing such private right of action to be applicable only to navigation-impeding deposits on the assumption that 33 U.S.C. § 407's prohibition was limited as such, *H. Christiansen & Sons* v. *City of Duluth*, 154 F.2d 205 (8th Cir. 1946); *Guthrie* v. *Alabama By-Products Company*, 328 F.Supp. 1140 (N.D. Ala. 1971), aff'd 456 F.2d 1294 (5th Cir. 1972), while other Courts recognize the full scope of the protective scheme intended by Congress so as to construe 33 U.S.C. § 407 to be applicable to all water deposits regardless of the effect on navigation, *Hawkinson* v. *Blandin Paper Company*, 54 F.R.D. 517 (D.Minn. 1972); *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*, supra, all the Courts are in agreement that § 407, by implication, provides a right of action to injured private parties.

This Court in *United States* v. *Standard Oil Company*, 384 U.S. 225, 226, 86 S.Ct. 1427, 1428 (1966), and further clarified in *United States* v. *Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 671-672, 93 S.Ct. 1804, 1814-1815 (1973), laid to rest the seeming ambiguity as to the prohibitory scope of § 13 in holding ". . . that § 13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation."

The holding by the District Court in this case, ". . . that § 407 does not create a private cause of action under the laws of the United States . . ." and affirmed by the Court below, constitutes a decision by the Court below clearly in conflict with at least one other Court of Appeals on the same matter, *Guthrie* v. *Alabama By-Products Company*,

328 F.Supp. 1140 (N.D. Ala. 1971), aff'd 456 F.2d 1294 (5th Cir. 1972); but, moreover, is inconsistent and clearly against the weight of authority. *Acme Boat Rentals, Inc.* v. *J. Ray McDermott & Company,* 424 F.2d 393 (5th Cir. 1970); *H. Christiansen & Sons* v. *City of Duluth,* 154 F.2d 205 (8th Cir. 1946); *Hawkinson* v. *Blandin Paper Company,* 54 F.R.D. 517 (D.Minn. 1972); *Kalur* v. *Resor,* 335 F.Supp. 1 (D.D.C. 1971); *Lavagnino* v. *Porto-Mix Concrete, Inc.,* 330 F.Supp. 323 (D.Colo. 1971); *Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District,* 259 F.Supp. 633 (E.D.Va. 1966). See also: *United States* v. *Pennsylvania Industrial Chemical Corp.,* 329 F.Supp. 1118 (W.D. Pa. 1971); *United States* v. *Maplewood Poultry Company,* 327 F.Supp. 686 (D.Me. 1971); *United States* v. *United States Steel Corporation,* 328 F.Supp. 354 (N.D.Ind. 1970).[3]

POINT II

Petitioner has a Federal right of action for damages under the Federal common law of water pollution.

In *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390 (1972), the Court held:

> "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a) We hold that it does; . . ."

[3] The District Court here may have qualified its holding by stating its adherence to that line of cases holding that there is no private right of action absent allegations relating to obstruction of navigation but, at the same time, noted that it is questionable to distinguish obstruction of navigation from pollution in light of *United States* v. *Standard Oil Company,* 384 U.S. 225, 86 S.Ct. 1427 (1966); and *United States* v. *Pennsylvania Industrial Chem. Corp.,* 411 U.S. 655, 93 S.Ct. 1804 (1973) where the United States brings an enforcement action.

This holding of the Court in *Illinois* v. *City of Milwaukee, Wisconsin,* supra, appears without restrictions either as to character of the parties involved, the nature of the relief sought, or whether the water pollution physically extended from one State's water boundaries into another State's.

It is true that the Court in *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 92 S.Ct. 1385 (1972), concerned itself to some extent with the character of the parties before it. But, the threshold issue was whether pollution of interstate or navigable waters of the United States creates actions within the meaning of 28 U.S.C. § 1331(a). In holding that it does, the Court did not limit such actions to the States alone. The Court held *Ames* v. *Kansas,* 111 U.S. 449, 470-472, 4 S.Ct. 437, 447-448, as controlling that, where a State is suing parties who are not other States involving Federal rights, the suit can be brought under 28 U.S.C. § 1331(a), regardless of the character of the parties.

The Federal common law of water pollution arises out of the deep Federal concern for and relationship to aquatic purity of our national interstate and navigable waterways.

Where a subject matter is one of Federal interest, the Courts have not hesitated in applying a Federal common law. *Hinderlider* v. *La Plata River & Cherry Creek D. Co.,* 304 U.S. 92, 58 S.Ct. 803 (1938); *Western Union Telegraph Co.* v. *Call Publishing Co.,* 181 U.S. 92, 21 S.Ct. 561 (1902); *State of Texas* v. *Pankey,* 441 F.2d 236 (10th Cir. 1971).

The Court in *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 92 S.Ct. 1385 (1972), directed attention to the numerous laws enacted by Congress with the theme of protection against pollution of interstate waters. These laws evince the increasing Federal concern with prevention of destruction through pollution of such waters a matter concerning and affecting not only the Federal Government and the States, but every individual.

These pollution and environmental protection statutes must be read in as broad a manner as possible so as to

fulfill their purpose. Such laws do not limit their protective use to the equitable relief of abatement or to a factual situation where the pollution has done its destructive work in two or more States.

As in *Illinois* v. *City of Milwaukee, Wisconsin,* supra, the relief sought by that State and the petitioner here is not expressly found in the body of statutory laws enacted by Congress. But, as the *Illinois* Court at 1392, quoting from *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456-457, 77 S.Ct. 912, 918, reiterated:

> "'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.'"

The District Court's narrow interpretation of *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91, 92 S.Ct. 1385 (1972), so as to limit it to its precise facts; i.e., a Governmental entity seeking to abate a nuisance of water pollution which has affected more than one State, clearly conflicts with the decision of this Court in that case which makes no such distinctions or limitations.

CONCLUSION

Petitioner prays that this Honorable Court take under advisement the questions herein presented by granting the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Ruling on Motion to Strike Demand for Jury.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. B-700

WALTER PARSELL, ET AL.

v.

SHELL OIL COMPANY, ET AL.

RULING ON MOTION TO STRIKE DEMAND FOR JURY TRIAL

Defendants' motion to strike plaintiffs' jury demand in this oil spill case raises important questions concerning the availability of federal jurisdiction for water pollution claims. The plaintiffs in this action claim damages for injuries arising out of an oil spill in Bridgeport harbor in 1970. The complaint alleges that while a cargo of oil was being pumped off a cargo ship to a terminal operated by the defendant Buckley Bros., an improper alignment of a valve caused a discharge of 655,000 gallons of oil into the navigable water of the harbor.

A previous motion to dismiss for lack of federal jurisdiction has been denied, the magistrate finding that whatever other bases of jurisdiction may exist, the complaint, at least alleged a cause of action in admiralty. Further consideration of available bases of federal jurisdiction is now required by defendant's motion to strike the demand for a jury trial. For if the sole basis for federal jurisdiction is admiralty, the plaintiffs have no right to a jury trial,

while if a separate and independent basis for federal jurisdiction exists to support a claim for damages at law, the jury demand must be honored.[1] Fed. R. Civ. P. 28; 7A Moore's Federal Practice ¶ 0.59[3]. Since there is no diversity of citizenship, it is necessary to examine plaintiffs' claim that jurisdiction may be founded on 28 U.S.C.A. § 1331.

Section 1331 clearly does not provide federal question jurisdiction for an admiralty claim, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). Plaintiffs argue, however, that they have stated a cause of action arising under the laws of the United States within the meaning of § 1331 for two separate reasons. First, they assert that they have an implied federal civil remedy under § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 407. Second, they argue that they have a claim arising under a federal common law of water pollution, which may be recognized for the purpose of § 1331 under the doctrine of Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

Do the plaintiffs have an implied private right of action under 33 U.S.C.A. § 407?

The federal statute that plaintiffs allege affords them a basis for federal jurisdiction makes it unlawful to discharge refuse matter into navigable waters.[2] Although private parties have brought suits under § 407 and companion sections of the Rivers and Harbors Appropriation Act, their success in previous cases is not controlling on the present issue. Many of the cases invoking § 407 were brought in admiralty and thus did not require consideration of whether a federal question claim at law existed.[3] In general these cases invoked the Act to support a standard of care rather than to provide a cause of action arising under federal law.

The cases finding a private right of action under other sections of the Rivers and Harbors Appropriation Act[4] are not controlling on the question of the existence of such a right under § 407. The statutory provisions involved in these cases, 33 U.S.C.A. §§ 401, 403, and 406, contain an express grant of jurisdiction to the district courts to grant injunctive relief for violations of those provisions. The absence of such a remedy in § 407 renders these cases doubtful authority for finding an implied right of action under this provision.

With the recent growth of environmental litigation in the federal courts, attempts to find some sort of private right of action implied under the 1899 statute have increased.[5] Our circuit left this disputed issue open in *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). But other cases that have recognized or denied a private right of action under federal regulatory statutes shed light on whether such a right can be found in § 407. See, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951); *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956); *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir. 1966); *Ivy Broadcasting Co.* v. *American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). These cases set forth a general doctrine "which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." *Reitmeister* v. *Reitmeister, supra* at 694. But they also make clear that "contrary implications" may be found in "the nature of the particular rule and its place in the regulatory scheme." *Colonial Realty Corp.* v. *Bache & Co., supra* at 182. The Supreme Court

set forth the proper standards for judging a particular statute in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975):

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [citations omitted].

Consideration of the statute in light of these criteria makes it clear that even though the statute explicitly condemns certain conduct, Congress intended to place responsibility for its enforcement somewhere other than in private hands.

Section 407, which makes discharge of refuse illegal, must be read together with the companion sections of the Rivers and Harbors Appropriation Act providing for enforcement. Section 411 of the Act provides that a violation of § 407 shall be punished by fine or imprisonment or both, and also provides that one-half of such fine shall be paid to the person or persons giving information leading to conviction.[6] Section 413 of the Act makes it the duty of the Department of Justice to enforce the Act and the duty of United States attorneys to prosecute whenever requested to do so by certain designated officials.[7] This statutory scheme evinces an intent to lodge enforcement

responsibility solely in the Department of Justice, which can make discretionary prosecutorial decisions taking into account the effects of other federal water quality legislation.[8] Congress has not authorized "private attorneys-general" to enforce this section. For this reason every court which has considered the question has denied to private plaintiffs the right to bring an action under the Act to recover in a *qui tam* action the percentage of the fine which they might have been entitled to receive as informers if an offense had been prosecuted to conviction.[9] Our circuit has taken this position in *Connecticut Action Now, Inc.* v. *Roberts Plating Co., supra,* stating: "It is hard to look at [the statutory] pattern except as a mandate that the Federal Government is to be the initiator of the proceeding." 457 F.2d at 85. See also *Hooper* v. *United States,* 331 F. Supp. 1056 (D. Conn. 1971); *Morris* v. *Tennessee Valley Authority,* 345 F. Supp. 321 (N.D. Ala. 1972).

While the Second Circuit reserved decision on the question of a private right of action for compensatory damages, its reasoning on the issue of a private suit for the informer's half of the fine is persuasive as to damages as well. Many of the persons in possession of information that could help the Government convict violators would be injured persons as well. If they could bring their own private suit for compensation, it would seem to follow that the informer's reward should be granted in the same proceeding, since all issues of law and fact with the exception of burden of proof would be the same or closely related. Yet it is the unanimous opinion of the federal courts that have considered the question that the Department of Justice must be the initiator of the proceeding. The informer's status as injured person has not enhanced his rights under the statute.[10]

Several courts have directly confronted the question of an implied right of action in favor of a private party

personally injured by a violation of § 407. *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (N.D. Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *Lavagnino* v. *Porto-Mix Concrete, Inc.*, 330 F. Supp. 323 (D. Colo. 1971); and *Chambers-Liberty Counties Navigation District* v. *Parker Bros. & Co.*, 263 F. Supp. 602 (S.D. Tex. 1967),[11] declined to find a private right of action under § 407, at least where the allegations of the complaint did not include obstruction of navigation. Justification for limiting any private right of action to cases involving navigation was found in the legislative history of the 1899 Act. As in these cases, there is no allegation of obstruction of navigation in the present case.[12]

Under the standards set by the Supreme Court in *Cort* v. *Ash, supra,* it would be inappropriate to find a private right of action implied under § 407 of the Rivers and Harbors Appropriation Act of 1899. The "class for whose especial benefit the statute was enacted" is the public at large rather than any particular private parties.[13] The legislative intent, as manifested by the scheme of enforcement through criminal prosecutions, is to leave the prosecutorial responsibility exclusively with the Department of Justice. Implication of a private remedy would upset the criminal enforcement system of this Act and the other federal water quality statutes, and would be inconsistent with the unanimous judicial construction that informer's fines be awarded only after a criminal prosecution has taken place. Finally, state law of nuisance and federal admiralty law provide ample traditional remedies, so that the Court's decision on this point does not leave the plaintiff without any redress. The Court does no more than hold that § 407 does not create a private cause of action under the laws of the United States so as to provide an independent basis for federal jurisdiction outside of admiralty.

Do the plaintiffs have a right of action under the federal common law of water pollution?

Plaintiffs urge that *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), requires a finding of federal question jurisdiction for § 1331 purposes on the theory that the claim arises under the federal common law of water pollution. The broadest possible reading of that decision would give considerable support to the plaintiffs. But at least three important factors were present in *Illinois* v. *Milwaukee* and are not present here. The first was the fact that the plaintiff was a governmental entity; the second was the interstate nature of the pollution involved; and the third was the claim in that case for equitable relief.

In *Illinois* v. *Milwaukee,* the plaintiff was a state. Further, in the cases cited by the Supreme Court in support of its holding, state plaintiffs were likewise involved. The Court quoted a passage from *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 238 (1907), highlighting the significance of the plaintiff's sovereign status:

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

As the Court in *Milwaukee* stated:

> Thus, a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. 406 U.S. at 107.

Several recent cases have extended the federal common law of nuisance action beyond cases brought by states as plaintiffs to include cases brought by the United States. See, *e.g.*, *United States* v. *Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972); 363 F. Supp. 110 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1976); *United States* v. *United States Steel Corp.*, 356 F. Supp. 556 (N.D. Ill. 1973); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); see also *Stream Pollution Control Board of Indiana* v. *United States Steel Corp.*, 512 F.2d 1036, 1040, n.9 (7th Cir. 1975). But this right of action has not been extended to suits brought by private plaintiffs. Thus in *Committee for the Consideration of the Jones Falls Sewage System* v. *Train*, 375 F. Supp. 1148 (D. Md. 1974), the Court agreed with the defendants that individuals and citizen associations could not bring an action based on the federal common law of nuisance.

Even if, as some commentators have urged,[14] the federal nuisance law right of action should be extended to private plaintiffs, at the very least this right of action should be limited to suits involving pollution with an impact on more than one state. In *Illinois* v. *Milwaukee* the discharges flowed from the state of Wisconsin to the state of Illinois and had an adverse impact on persons living in the state of Illinois. In contrast, although the oil spill involved here took place in navigable waters, no

interstate effect[15] is alleged in the complaint. The impact of the spill appears to have been limited to Bridgeport Harbor. See *Reserve Mining Co.* v. *Environmental Protection Agency*, 514 F.2d 492, 520 (1975), in which the Court rejected the federal common law of nuisance as a basis of relief because "federal nuisance law contemplates, at a minimum, interstate pollution of air or water." The Court noted that neighboring states had not complained and no effects outside the Silver Bay, Minnesota, area were alleged.

It will take a clearer indication than the opinion in *Illinois* v. *Milwaukee* to persuade me that the Supreme Court intends federal jurisdiction for a common law claim to be available for every incident of pollution involving navigable waters.

Finally, there is some justification for limiting any right of action under *Illinois* v. *Milwaukee* to private parties seeking injunctive relief rather than damages.[16] Part of the reason why the Supreme Court encouraged the development of the federal common law of water pollution in *Milwaukee* was the need for resolution of intricate and highly important questions of the appropriate water quality standards to apply. As the Court said, "these will be equity suits in which the informed judgment of the chancellor will largely govern." 406 U.S. at 107-108. A jury awarding damages in an oil spill case with wholly intrastate impact would be contributing to the development of evolving water quality standards only in the most *ad hoc* way.

Conclusion

Since neither the Rivers and Harbors Appropriations Act nor the federal common law of water pollution affords a basis for invoking federal jurisdiction for a damage

action brought by private plaintiffs for pollution not affecting interstate interests, the case must remain on the admiralty side of the Court. Defendants' motion to strike the jury demand is therefore granted.

Dated at New Haven, Connecticut, this 19 day of October, 1976.

JON O. NEWMAN
Jon O. Newman
United States District Judge

FOOTNOTES

[1] The plaintiffs have not suggested that there are pendent state law claims which a jury should hear. The complaint is in one cause of action, characterized in the jurisdictional allegations as a "maritime tort."

[2] 33 U.S.C.A. § 407 reads as follows:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed.

[3] *See, e.g., Acme Boat Rentals, Inc.* v. *J. Ray McDermott & Co.*, 424 F.2d 393 (5th Cir. 1970); *Burgess* v. *M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973); *Lauritzen* v. *Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633 (E.D. Va. 1966); *Gulf Atlantic Transp. Co.* v. *Becker County Sand & Gravel Co.*, 122 F. Supp. 13 (E.D.N.C. 1954); *Maier* v. *Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd*, 154 F.2d 1020 (3d Cir. 1946).

[4] *See, e.g., Neches Canal Co.* v. *Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928); *Lauritzen* v. *Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633 (E.D. Va. 1966); *Sierra Club* v. *Leslie Salt Co.*, 354 F. Supp. 1099 (N.D. Cal. 1972); *Sierra Club* v. *Morton*, 400 F. Supp. 610 (N.D. Cal. 1975); *Potomac Riv. Assn., Inc.* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344 (D. Md. 1975).

[5] Annot., Right of Private Party to Sue Polluter, 15 A.L.R. Fed. 636; Note, Environmental Law—Private Remedies for Pollution of Navigable Waters, 50 No. Car. L. Rev. 153 (1971).

[6] Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

[7] The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same . . .

[8] Fed. Water Pollution Control Act, 62 Stat. 1155, 33 U.S.C. § 1151; National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*

[9] *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Hughes* v. *Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972); *Jacklovich* v. *Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Anderson* v. *Norfolk & Western Ry.*, 349 F. Supp. 121 (W.D. Va. 1972); *Gerbing* v. *I.T.T. Rayonier Inc.*, 332 F. Supp. 309 (M.D. Fla. 1971); *Mitchell* v. *Tenneco Chemicals, Inc.*, 331 F. Supp. 1031 (D.S.C. 1971); *Enquist* v. *Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *Lavagnino* v. *Porto-Mix Concrete, Inc.*, 330 F. Supp. 323 (D. Colo. 1971); *Bass Anglers Sportsman Soc.* v. *Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *United States ex rel. Mattson* v. *Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *United States* v. *Florida-Vanderbilt Development Corp.*, 326 F. Supp. 289 (S.D. Fla. 1971); *Reuss* v. *Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971); *Bass Anglers Sportsman's Soc.* v. *United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Bass Angler Sportsman Soc.* v. *United States Steel Corp.*, 324 F. Supp. 412 (M.D. Ala. 1971), *aff'd per curiam*, 447 F.2d 1304 (5th Cir. 1971); *Durning* v. *I.T.T. Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970).

[10] Although in the *Connecticut Action Now* case and some of the other *qui tam* cases the plantiff did not claim to be personally injured and would not have been able to recover compensatory damages in any event, the fact that plaintiff was personally injured has not changed the result in the cases which have presented the issue. *See, e.g., Lavagnino* v. *Porto-Mix Concrete, Inc., supra.*

[11] *See also H. Christiansen & Sons, Inc.* v. *City of Duluth*, 154 F.2d 205 (8th Cir. 1946), in which the Court expressed grave doubts concerning the existence of any federal question jurisdiction in a private suit under § 407 and concluded at 207:

> The statute relied upon has particular reference to impeding or obstructing navigation. It is a penal statute and hence, must be strictly construed. It contains no provision for the recovery of damages for its violation. It does not on its face purport to establish a civil liability. It imposed a penalty as punishment for a wrong to the public. Any private right of action which exists under it is by implication only and would not in any event extend beyond the purposes of its prohibitions.

[12] In view of the absence of allegations relating to obstruction of navigation in this complaint, the Court follows these cases insofar as they hold that the Act creates no private cause of action against a polluter. But it should be noted that reading the 1899 legislative history to distinguish obstruction of navigation from pollution is questionable in light of the Supreme Court's recent interpretations of the Act to encompass pollution as well as obstruction where the United States brings an enforcement action. *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973).

[13] *See Guthrie, supra*, 328 F. Supp. at 1145, citing *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), for the proposition that "a principal beneficiary of the Act if not the principal beneficiary, is the Government itself."

[14] Note, Environmental Law—Cause of Action Under Federal Common Law for Pollution of Interstate Waters, 77 Dick. L. Rev.

451 (1973); Note, Jurisdiction—Federal Common Law Under 1331(a), 52 Neb. L. Rev. 301 (1973); McMahan, The New Federal Common Law, 13 For the Defense 83 (1972).

[15] "Interstate effect" is used here to mean pollution originating within one state adversely affecting another state. Of course, as a matter of constitutional power Congress can regulate pollution affecting interstate commerce as expansively as the modern reach of the commerce clause permits, and this power can be used to authorize private enforcement if Congress so chooses. But courts asked to fashion a federal common law to adjudicate interstate disputes have usually done so only in contexts where the "interstate" nature of the dispute concerned states or state interests, rather than matters within interstate commerce in the constitutional sense. *See* Note, "The Case for a Federal Common Law of Aircraft Disaster Litigation," 51 N.Y.U.L. Rev. 231, 243, n. 84 (1976).

[16] *See Byram River* v. *Village of Port Chester, N.Y.*, 394 F. Supp. 618 (S.D.N.Y. 1975), where the suit was brought to abate the depositing of inadequately treated sewage. The private plaintiffs included not only an individual and an association, but also the river itself. The requested relief, however, was equitable in nature.

APPENDIX A-1

Ruling on Motion to Certify Interlocutory Appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. B-700

WALTER PARSELL, ET AL.

v.

SHELL OIL COMPANY, ET AL.

RULING ON MOTION TO CERTIFY INTERLOCUTORY APPEAL

Plaintiffs have moved for an order in accordance with 28 U.S.C. § 1292(b) to amend the Court's Ruling of October 19, 1976, to certify that that Ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

The legal question relating to federal question jurisdiction under 33 U.S.C. § 407 was left open by this Circuit in *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). The legal question of a private party's right to invoke federal jurisdiction to enforce a claim under a federal common law of pollution under *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), is the subject of much current dispute in judicial decisions and law review commentary. Furthermore, there is precedent for interlocutory appeal of an order concerning the right to trial

Ruling on Motion to Certify Interlocutory Appeal.

by jury. *Ross* v. *Bernhard*, 403 F.2d 909 (2d Cir. 1968), *aff'd*, 396 U.S. 531 (1970).

While this kind of discretionary certification might not be appropriate if the court trial could be expected to be brief, the parties have informed the Court that such is not the case. Plaintiffs' counsel has estimated that the trial will take approximately a month of court time, and that proving both liability and damages will require bringing witnesses—including experts—from as far away as California. Clearly a second trial with a jury, should the plaintiffs prevail on this issue after appeal from a final judgment, would create great hardship for all concerned.

Under the circumstances it is appropriate to grant the plaintiffs' motion. The October 19 Ruling on Motion to Strike Demand for Jury Trial is hereby amended by adding the following sentence:

> This order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of the litigation.

Dated at New Haven, Connecticut, this 21 day of December, 1976.

JON O. NEWMAN
Jon O. Newman
United States District Judge

APPENDIX B

Order of Court of Appeals Granting Leave to Appeal Pursuant to 28 U.S.C. § 1292(b).

76-8549
C 65

UNITED STATE COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-seven.

WALTER PARSELL, et al.,

Plaintiffs-Appellants,

v.

SHELL OIL COMPANY & BUCKLEY BROS.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the petitioner dated December 28, 1976 for leave to appeal pursuant to 28 USC § 1292(b) be and it hereby is granted.

ROBERT P. ANDERSON, by J.L.O.
JAMES L. OAKES,
MURRAY I. GURFEIN, Circuit Judges

APPENDIX C

Order and Judgment of the Court of Appeals.

77-7066

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 15th day of July, one thousand nine hundred and seventy-seven.

DOCKET No. 77-7066

Present:

Hon. James L. Oakes,
Circuit Judge.
Hon. Robert L. Carter,
District Judge.

East End Yacht Club, Inc., individually and on behalf of various pleasure boat owners,

Appellants,

v.

Shell Oil Co. and Buckley Bros.,

Appellees.

ORDER

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut.

Order and Judgment of the Court of Appeals.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order granting motion to strike demand for jury trial is affirmed on the basis of Judge Newman's opinion dated October 19, 1976 (Civil No. B-700).

JAMES L. OAKES
Circuit Judge.

ROBERT L. CARTER
District Judge.

APPENDIX D

Statute.

33 U.S.C. § 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

APPENDIX E

Complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

WALTER PARSELL and VIOLET PARSELL, GEORGE HOOPER, HOUSATONIC MARINA, INC., SHELLFISH LABORATORY, a partnership by EDWIN C. FORDHAM, partner and EDWIN C. FORDHAM, EAST END YACHT CLUB, INC., individually and on behalf of various pleasure boat owners,

Plaintiffs,

against

SHELL OIL COMPANY and BUCKLEY BROS.,

Defendants.

PLAINTIFFS DEMAND A TRIAL BY JURY

COMPLAINT

Plaintiffs, complaining of the defendants, by their attorneys Goldman & Rosen (Jacob Rassner, of Counsel) respectfully show to this Court as follows:

FIRST: That pursuant to stipulation by counsel for all the parties hereto and the approval of the Hon. Harold R. Tyler, Jr., United States District Judge, the actions wherein the above named are plaintiffs, pending in the United States District Court for the Southern District of New York, were consolidated for all purposes in said Court, and in a deposition of Dale Nolf, as a witness, taken on September 24, 1971 in an examination before trial of

the defendant, Shell Oil Company, it was stipulated by all counsel in the actions pending in the United States District Court for the Southern District of New York, as well as by Whitney Diggs, of counsel for Pullman, Conley, Bradley & Reeves, Esqs., attorneys for Buckley Bros., that the said deposition would be applicable to all cases by the plaintiffs named in this action.

SECOND: Jurisdiction is based on damages due to a maritime tort by the carrying of a cargo of oil by a tankship and causing the oil to escape or spill from the tankship onto the navigable waters of the United States, without having taken any or adequate precautions to provide for the safe carriage and delivery of cargo by ship without the danger of it spilling on to the navigable waters of the United States as it was being delivered from the ship to shore facilities. 33 U.S.C. § 407.

THIRD: That the plaintiffs Walter Parsell and Violet Parsell are residents and citizens of the State of Connecticut.

FOURTH: That the plaintiff George Hooper is a resident and citizen of the State of Connecticut.

FIFTH: That the plaintiff Housatonic Marina, Inc., Shellfish Laboratory was and is a partnership, of which plaintiff Edwin C. Fordham is a partner, and is duly licensed to do business in the State of Connecticut.

SIXTH: That the plaintiff East End Yacht Club, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut.

SEVENTH: That at all the times hereinafter mentioned, the defendant Shell Oil Company was a foreign corporation, duly licensed to do business in the State of Connecticut.

EIGHTH: That at all the times hereinafter mentioned, the defendant Buckley Bros., upon information and belief, is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut.

NINTH: That at all the times hereinafter mentioned, the defendant Buckley Bros., owned, operated and controlled a certain split terminal or a portion thereof as a sales arm of Buckley Bros., as well as a terminal operator to take in cargos of products to be put through for defendant Shell Oil Company.

TENTH: That at all the times hereinafter mentioned, the defendant Shell Oil Company owned, operated and controlled certain cargo ships which were engaged in delivery and did deliver oil to the premises of the defendant Buckley Bros., aforementioned.

ELEVENTH: That at all the times hereinafter mentioned, and for sometime prior thereto, cargos of oil were brought by the defendant Shell Oil Company to the terminal of the defendant Buckley Bros., and that lines from the ship's compartments would be connected by the defendants jointly with the assistance of the agents, servants and employees of both defendants, including the ship's crew and defendant Buckley Bros. terminal personnel, utilizing the ship's pumps to pump the petroleum off the ship through the cargo lines owned, operated and controlled by the defendant Buckley Bros.

TWELFTH: That it was the duty of the defendants and each of them to make certain that the connections of the

lines were properly made from the ship to the terminal, including the proper lining up of the valves so that the oil product would get to the right tank in the Eagles Nest Tank Farm.

THIRTEENTH: That at all the times hereinafter mentioned, the ship's pumps had been put into and were operated by the ship's crew and power on the orders of the agents, servants and employees, signals and control of the defendant Buckley Bros.

FOURTEENTH: That on or about the 14th day of June, 1970, certain petroleum cargo was delivered by tankship owned or chartered by defendant Shell Oil Company to the defendant Buckley Bros., and the tankship dock at Buckley Bros., main cargo dock.

FIFTEENTH: That on or about the 15th day of June, 1970 there was a discharge of a large quantity of oil on to Johnson's Creek area.

SIXTEENTH: That the oil spill was due to one valve which was left open due to improper alignment, which should have been closed, resulting in an oil spill of 655,000 gallons or more.

SEVENTEENTH: That as a result of the foregoing, each of the plaintiffs were caused to suffer extensive damage to their real and personal property, including equipment and products, and caused to suffer loss and impairment of business and other damage of a continuous and continuing nature by reason of foul smelling oil soaking into the plaintiffs' facilities and causing foul odors to emanate from plaintiffs' products and equipment, and causing destruction of and killing of fish, shell fish and fish food, and rendering plaintiffs' properties unfit for their respective

intended businesses and purposes, causing the plaintiffs to suffer damage and loss of business and impairment of future business, all to their damage, each in excess of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiffs demand judgment against the defendants herein, each in excess of Ten Thousand ($10,000.00) Dollars, together with the costs and disbursements of this action.

GOLDMAN & ROSEN
Attorneys for Plaintiffs
Office & P.O. Address
The First Connecticut Building
177 State Street
Bridgeport, Conn. 06604

JACOB RASSNER,
Of Counsel.

Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-556

EAST END YACHT CLUB, INC.,
Petitioner,

v.

BUCKLEY BROS., INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit With Supplemental Appendix.

DION W. MOORE
Counsel for Respondent
PULLMAN, COMLEY, BRADLEY & REEVES
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No.

EAST END YACHT CLUB, Inc.,

Petitioner,

v.

BUCKLEY BROS., Inc.,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Buckley Bros., Inc., your respondent, hereby opposes petitioner's prayer for writ of certiorari filed on October 14, 1977 and requests that it be denied.

Opinion Below.

The United States Court of Appeals for the Second Circuit in an unreported opinion affirmed the order of the District Court based upon its opinion reported at 421 F. Supp. 1275—Appendix A and A-1. Submitted by

way of supplement to the United States Court of Appeals was an appendix setting forth the claims of the sole remaining plaintiff which is annexed hereto (SA1-SA7).

Questions Presented.

1. Does the petition present any special and important reasons for review by this Court?

2. Do the facts and law in the instant case conflict with any decisions in other circuits or decisions of this Court?

3. Is the determination made by the District Court of such finality that it warrants review by this Court?

Statement of Case.

In view of the fact that events occurring subsequent to the decision of the District Court have changed the complexion of this case considerably, the facts are set forth as they now apply.

On June 15, 1970, there was a discharge of oil onto Johnson's Creek. The oil spill came from the overflow of Buckley's No. 7 tank through a rupture in a six-inch cast iron plug on the tank. The overflow resulted from the failure of a Buckley workman to properly align a valve located on a pipe through which a cargo vessel "Overseas Audrey" was pumping No. 2 oil.

The valve on the pipe in question was located approximately one quarter of a mile away from the vessel, and the work of discharging the oil and alignment of the valves was being performed by and in control of Buckley Bros. employees. The power source for the discharge of the oil into the pipes came from pumps on the vessel "Overseas Audrey" under charter to defendant, Shell Oil

Company. As soon as the crew members of the vessel were advised of the spill from tank No. 7, all pumping operations were stopped. Approximately 655,000 gallons of No. 2 oil were spilled.

In accordance with these facts, the District Court determined as a matter of law that under applicable maritime negligence principles the evidence submitted permitted no inference of control which might conceivably create any duty which was breached by Shell Oil Company, and by memorandum of decision dated September 2, 1974, granted summary judgment in its favor. Following a denial of a motion to re-argue the summary judgment ruling, the plaintiffs appealed to the Court of Appeals for the Second Circuit. *Parsell, et al. v. Shell Oil Company, et al.* (2nd Cir., Docket No. 75-7626). That appeal was subsequently discontinued without prejudice by stipulation dated May 3, 1976 leaving as the remaining and sole defendant, Buckley Bros., Inc.

In light of the complaint that the claim for relief was one based upon a maritime tort and the references made in the plaintiffs' pleadings that they had "a good, valid and meritorious admiralty action," Buckley Bros., Inc. moved to dismiss the jury claim on the basis that federal jursdiction, being based upon admiralty and maritime claims (Title 28 U.S.C. §1333) did not give the plaintiffs a right to trial by jury. This motion was granted by Judge Jon O. Newman on October 19, 1976 and leave to appeal from this order was granted pursuant to 28 U. S. C. §1292 (b) on January 28, 1977.

Prior to the appeal being heard by the Court of Appeals, all of the claims of the plaintiffs, save those of East End Yacht Club, were settled and resolved. Claims disposed of were those asserting damage to shellfish beds in Bridgeport Harbor, damage to young oysters being raised in rafts in the Housatonic River and like matters.

The remaining claims of East End Yacht Club are somewhat different. The Club makes claim for the replacement and repair of its docks, damages to an aeration system, loss of profit derived from its annual picnic, and a variety of other miscellaneous items including the fact that oil was tracked into the Clubhouse proper (SA2). These claims are far different from the claims made by the other plaintiffs and have little or nothing to do with "aquatic purity" or the navigable waterways.

Reasons for Denying Writ.

POINT I.

There are no special or important reasons for review.

This Court should not and will not grant a petition for writ of certiorari unless there are presented special and important reasons therefor. Rule 19—Rules of the Supreme Court of the United States. The instant case, as it now stands, presents a variety of miscellaneous claims most of which are simple, common law nuisance claims and some of which are not actionable at all. As such, the case as it presently stands does not present to this Court any issues of "deep federal concern," "federal interest," or "appropriate federal remedies" for such injuries. Indeed, in its present posture, this case deals with a simple land based tort alleging damage to property affixed to the shore with no relationship to traditional maritime activities. *Executive Jet Aviation v. Cleveland,* 409 U. S. 249 (1972). As such, there is considerable question as to whether there is any reasonable basis for any federal jurisdiction over the remaining claims. In addition, it is pointed out that East End Yacht Club has been credited $55,865 for losses already sustained which amounts to substantially all the damages to which

it may be entitled (SA2). Those large items claiming loss of use are clearly not actionable under any jurisdictional theory (SA3). See: *Oppen v. Aetna Insurance Co.,* 485 F. 2d 252 (9th Cir. 1973).

In sum, this case in its present posture does not properly present any of the issues raised by the petitioner and, indeed, does not even reflect what the District Court characterized as "important questions concerning the availability of federal jurisdiction for water pollution claims." This is so as there no longer exist any claim for water pollution. The remaining damages, insofar as they are actionable, relate solely to property damage to shore side equipment.

POINT II.

There is no conflict between this case and any other decisions in the Circuits or this Court.

The petitioner attempts to argue that the holding of the District Court that Title 33 U. S. C §407 does not create a private cause of action conflicts with other cases which have purportedly analyzed the same question. However, the cases referred to by the petitioner were all determined prior to *Cort v. Ash,* 422 U. S. 66 (1975), which held as follows:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose special benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

East End Yacht Club is not one of a class for whose special benefit this statute was enacted. Nor is there any indication that Congress has authorized private Attorney Generals to enforce the statutory scheme. It is apparent that the plaintiff has ample remedies whether it be under the state common law of nuisance or the oar of federal admiralty jurisdiction. Furthermore, this case does not involve the same matters of concern raised in the cases cited by the petitioner. There is clearly no navigation impeding deposit involved in this case and it is difficult to understand how the loss of profit from the annual picnic can be construed to fall within any federal interest in water pollution. Finally, it must be remembered that *Illinois v. City of Milwaukee, Wisconsin,* 406 U. S. 91 (1972), relied upon by petitioner, was a case involving original jurisdiction. That case does not suggest that a new federal cause of action should inure to a plaintiff of the type herein making complaints of oil being tracked around its club room floor (SA6).

In sum, there is no conflict between the instant case on the facts as they now stand and any other factually similar case in any other jurisdiction.

POINT III.

The interlocutory order entered in this case should not be heard by this Court.

While the Court of Appeals for the Second Circuit certified this case as an interlocutory appeal in accordance with 28 U. S. C. §1292(b), it did so prior to the great

bulk of the claims being settled. Certainly, it is doubtful whether the District Court would now determine that the case presently involves controlling questions of law on which there is a substantial ground for difference of opinion. As such, the interlocutory order should not be heard by this Court.

Quite apart from the fact that this is an interlocutory order, it is pointed out that the plaintiffs elected admiralty jurisdiction to try their case in the first place, and where a martime claim is relied upon and identified as such, there is no right to trial by jury. *Romero v. Bethlehem,* 368 F. Supp. 890, aff. 515 F. 2d 1249 (5th Cir. 1974); *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.,* 317 F. Supp. 798 (D.P.R. 1969). As such, the issues raised in the petition are wholly hypothetical.

Conclusion.

For the foregoing reasons, it is respectfully requested that the petition be denied.

THE DEFENDANT,
By Dion W. Moore,
Pullman, Comley, Bradley & Reeves,
855 Main Street,
Bridgeport, Connecticut 06604

Supplemental Appendix.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1977.

No. .

EAST END YACHT CLUB, Inc.,

Petitioner,

v.

BUCKLEY BROS., Inc.,

Respondent.

Itemization of Damages of East End Yacht Club, Inc. **SA2**

Portions of Deposition of Pasquale Petrino **SA5**

East End Yacht Club
Itemized Statement of Special Damages.

1.	Bradley—Upson: For replacement and repair of Club Floats and other damage	41,980.00
2.	Federal Electric: For dock rewiring (quote from County Electric $15,660.00)	13,885.00
		55,865.00
	Credits for amounts Travelers paid to Bradley—Upson and Federal Electric or for them:	55,865.00
3.	Clean bulkhead	1,600.00
4.	Launching ramp, 92′ x 44′ x 2″ depth (Club member labor, trap rock and road mix)—excavate and install (D'addario quote)	6,100.00
5.	Incidental costs to clean up	1,000.00
6.	Emergency lighting during clean up to protect marina	500.00
7.	Cost of installing master aeration system and cost of equipment by club members, equipment purchased from Scales Engineering, Quote by Scales Engineering Co. for whole job	20,000.00
8.	Loss of potential revenue for Season, 5 months @$1,000.00 per month	5,000.00
9.	Loss of Picnic profit, including bar	800.00

10.	Cancelled boat reservations for Strawberry Festival, June, 1970, 18 boats @$10.00 per night, 2 or 3 nights	500.00
11.	Lost use of club members' boats during period of time restricted from boarding craft per order of Coast Guard, 180 boats docked at Club, charter rates $300.00 for 28′ craft and $150.00 for outboard runabout, average cost for two weeks	40,000.00
12.	Additional time lost awaiting opening of Johnson's Creek and loss of use while in for repairs, two to six weeks	80,000.00
13.	Additional costs for labor which would have otherwise been provided by Club members, see production 5 A 1	

(a) Electrical—$6,700.00

(b) Watchman's pay—$264.00

(c) Pick up labor—$100.00

(d) Reiner Construction (finish work) —$2,000.00

(e) Edward Simons (additional plumbing)—$3,500.00

(f) Al Karr (extra flashing)—$85.00

(g) Oakland Tile (laying floor)—$917.80

(h) Mr. Kwoka (cool box)—$354.00

(i) J. J. Fence (fire escape)—$1,000.00

(j) Fire Escape Fabrication (not being able to weld due to oil)—$300.00

(k) Master Tile Co. (ceramic tile)—$560.00

(l) Vito DeMartino (outside trim paint)—$370.00

(m) J. J. Fence (outside welding railings)—$230.00

(n) Charles Sheet Metal (ducts)—$600.00

(o) Loss of voluntary help to construct new building in addition to above—$4,000.00

	Subtotal—	20,980.80
14.	County Electric bid 15,660.00 less paid by Travellers 13,885.00 due	1,985.00
15.	Repaint docks, ramps, ships, etc. by members (Quote from Washington Decorator 5A2)	3,500.00
16.	Labor for moving and shifting 200+ boats, trailers and dock cranes to facilitate removal of oil and later to refit docks, approximately 1200 man hours @$5.00 an hr.	6,000.00
17.	Clean launching ramp	2,000.00
Total		$245,830.80

Portions of Deposition of Pasquale Petrino.

Q. Was there any change in your income from 1968 to 1969? A. No. I believe it was about stable.

Q. Did it change at all in 1970? A. '70 is a hard year because of the new building.

Q. I'm talking about your income now, not your expenditures. A. No. Because of the new building it's a hard year because we did expend so much more with that new building going up, and I am not certain just what the figures are. We don't have them in our hands just yet. They will be delivered to us in March. That's our annual meeting, and all our figures are given from the CPA.

Q. Did your income insofar as rental of boat slips, lockers—has that changed in any manner? A. No.

Q. Was your restaurant in 1970 still being operated on a concession basis? A. In 1970 at times, yes. We had a very bad year for the restaurant. We couldn't keep people there. Once the oil spill came down nobody wanted to eat.

• • •

Q. Were any repairs made to these docks subsequent to the finding of oil? A. Repairs made after the spill?

Q. To the docks, yes. A. Yes.

Q. When was that? A. Between two and three weeks after the spill.

Q. What was done in terms of repairs? A. All the docks were taken out of the water and repaired, taken apart and all new styrofoam was placed in.

Q. Was any of the planking renewed or new planking put in? A. The only time new planking would have been put in is if it was broken by a contractor or split when they hoisted it.

Q. Do you have all the bills involved in having all this repair work done? A. Yes.

Q. When were the docks completely repaired? A. It was well in September before the job was finished.

Q. They are presently in good order and repair? A. Yes.

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Q. What other damage did you sustain? A. What other damage, physical?

Q. Yes, physical, to the physical aspects of your property. A. The whole thing was soaked up in oil. The shoreline, ramp, what not. Oil was tracked into the club. We had damages because of the spill itself, the contractors wouldn't continue on. They were scared to continue on because the Fire Department was there and watching everybody.

The welding that was tying in portions of our backwalk had to stop. The carpenters couldn't stand the oil, he wouldn't stay around. The mason wouldn't be doing much work there.

Q. How long after the spill did these people refuse to work? A. They came back a couple of weeks, three or four weeks after the spill, when this cleared up a bit. Well, we lost all of our volunteer help that we had counted on with the construction of this building. We had to subcontract—we were the general contractor. We did all the subcontracting work, this particular building.

Q. Did all building activities, in building this building, stop? A. For well into three weeks, at least three weeks, all of it stopped.

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Q. Did this oil spill cause any damage to the aerator system that was in there? A. It might have damaged the lines somewhat. It softened up some of the plastic. But it's impossible to run them without power. You need electricity to run these compressors.

We did not have electricity.

Q. You didn't have electricity on the docks? A. We didn't have it since the time of the spill.

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Q. Where on the docks are the duplex waterproof receptacles located? A. On 4x4 posts.

Q. How far above the planking of the dock is that located? A. Around five feet.

Q. What damage was caused to these duplex receptacles by the oil? A. Because the docks had to be taken out to be rebuilt or new styrofoam put in, the electrical inspector claimed that there is now a revision in the marina codes, and once your electrical lines are dismantled, they will no longer be allowed to be put up.